CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

"Top-down" vs. "Bottom-up": A Dichotomy of Paradigms for the Legitimation of Public Power in the EU

by

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Perspectives on Federalism, Vol. 9, issue 2, 2017

Abstract

Public power has been justified by resorting to two different kinds of legitimation: one coming from above, the other emerging from the governed. While legitimation "from above" implies that those who are vested with executive power are qualified in their function because of their allegedly higher competences, "bottom-up" legitimacy always presupposes that only citizens can properly decide on their destiny. After giving a brief account of how both legitimation strategies have developed in the history of political ideas, attention is focused on the theories regarding the legitimacy of public power in the European Union. Indeed, both strands of legitimation of public power are represented here with original proposals, according to the specificity of the supranational condition. But even more interesting is that the research into the characteristics of supranational integration has been one of the most significant fields in which the legitimation "from above" has reappeared in Western thought after a rather long period of marginality, now taking the shape of a technocratic justification. In the main section of the article, the reasons in favour of a democratic "bottom-up" legitimation of the European public power are analyzed first, then those which recur to the so-called "output legitimacy" – in other words to technocratic arguments. The last section of the contribution is dedicated to an overall assessment of the different positions.

Key-words

administrative legitimacy, comitology, democratic deficit of the EU, democratization of the EU, demoi-cracy, EU constitutionalism, European people, executive federalism, holism, individualism, input legitimacy, no demos thesis, output legitimacy, paradigms of order, renationalization, technocracy.

1. Introduction

The power of the European Union – like any other power in a social and institutional context – is characterized by different dimensions, all of which, however, are united by a common element, namely legitimacy. In fact, only a power which is recognized as legitimate can demand to be obeyed, while an authority without obedience is merely abstract and, in the concreteness of social life, factually void. An essential element of the legitimacy of power consists in its source: the claim to obedience is recognized as justified only if the foundation of authority – which I define, here, as the tangible expression of power – is generally regarded as well-grounded and thus accepted. Limiting the analysis to the public dimension of power and concentrating on its sources, we can identify two opposite conceptions. According to the first, public power originates "from above" as an expression of strength, tradition, natural order, or divine will. On the basis of the second conception, instead, legitimate power can only originate "from below", i.e., from the free and reflexive will of those who decide to constitute a public power and to abide by its decisions. The dichotomy between the paradigm asserting the "descending" origin of the legitimacy of public power and its "ascending" counterpart is concisely presented in the next Section (2).

The analysis of characteristics and perspectives of public power in the European Union (EU) from the standpoint of the dichotomy between "descending" and "ascending" paradigms deserves attention in particular for one reason. In fact, over the last decades the debate on the EU has been a significant breeding ground for the renewal of the "top-down" understanding of the legitimacy of public power which had factually and theoretically disappeared from the political horizon of Western democracies. More specifically, it is precisely a certain interpretation of EU power and of its legitimacy that takes up the idea of an authority justified on the basis of an alleged superiority of elites, thus revitalizing a conception which was largely regarded as belonging to the pre-democratic past. Therefore, the third Section will focus on how the dichotomy between "top-down" and "bottom-up" power can be applied to the debate on the EU public power (3).

The current economic, institutional, political, social and – we could also add – ethical crisis of the EU has shed new light on the opposing paradigms as well as on the possible solutions that can be formulated on the basis of their conceptual frameworks. The final Section is dedicated to some considerations on the future of the EU from the perspective of the conflicting understandings of public power, as well as to a cautious, but nevertheless passionate defense of the "ascending" concept of legitimacy (4).

2. "Descending" and "Ascending" Understandings of the Legitimacy of Public Power

In classical political thought, the theory of the different forms of government was based on the number of rulers (Bobbio 1985: 129). Since Aristotle, we had three patterns of public power: the monarchy, or the government of one person; the aristocracy, or the government of the few; and democracy, or the rule of the many. It was Hans Kelsen who introduced a fundamental turning point: from a quantitative distinction – with a potentially unlimited number of typologies – he switched to a qualitative difference, based on a dichotomy and, thus, on only two ideal types of government (Kelsen 1949: 283). The discriminating element is identified in the method adopted for the creation and justification of the legal order. In the first case the process is "descending", in the sense that power falls down from above to those who are vested with it, while the subjects are largely excluded from the decisions. Kelsen calls this form of government "autocratic". In the second case the power "ascends" from the governed; in other words, it is originally vested in the individuals and arises from them to those who are chosen to govern the political community. This is the fundamental feature of what we call "democracy". Kelsen's novelty brought a significant simplification; furthermore, it introduced also an explicit normative dimension. According to Kelsen, indeed, in a society which is no longer characterized by a predetermined and passively shared idea of the good life, the legitimation of power can only proceed from those who are obliged to abide by its rules (Kelsen 1929: 102). Although only introduced relatively recently, the taxonomy of the forms of public power on the basis of its provenance – and of the sources of its legitimacy – can be easily applied backwards, allowing a dichotomous interpretation of the history of political thought.

2.1. The "Descending" Conception of Public Power

Insofar as the first term of the dichotomy is concerned, public power is regarded as "descending" for two reasons: first, the holders of power claim to derive it from above, mostly from natural or divine authority; secondly, the authority "descends" from the rulers to the ruled, whereby the marginal involvement of the latter is far from fulfilling the conditions for genuine autonomy. Examples of public power derived from the law of nature have accompanied us for most of the history of Western political thought. Starting from ancient times – and from the two most famous exponents of ancient political philosophy – in both Plato's "justice"-based *politeia* (Plato 1901: IV, 433b) and Aristotle's idea of the organic political community, which aims at realizing "happiness" (Aristotle 1967: I, 2, 1252b), the social functions of the citizens depend on the immediate expression of their natural qualities. Moreover, the identification of these qualities is ultimately a decision imposed from above and not the expression of a free individual preference. Therefore, if the tasks carried out in the community are directly derived from the natural abilities of individuals and the ruling class is seen as a specific component of the organic whole, connected to the rest but also functionally separate from it, then the holders of public power must be chosen by cooptation on the basis of alleged innate qualities that would predestine them for the exercise of authority.

After a period in which – during the Middle Ages – the "descending" character of authority was justified by resorting to a supposed divine will, the reference to natural order as the basis for legitimate power became central again in Jean Bodin's theory of sovereignty. In the first of his *Six Livres de la République*, introducing the fundamental elements of his philosophy, he asserted that "sovereignty is the absolute and perpetual power present in a political community (*République*)" (Bodin 1579: 85). As a result, the sovereign is *legibus solutus* and the laws promulgated by him "only depend on his pure and free will" (Bodin 1579: 92). To justify sovereign power, Bodin relied on Aristotle's theory of the familistic origin of the political community. According to this, the *République* "is the well-ordered government of many families and of what is common to them by a sovereign power" (Bodin 1579: 1). The premise, here, is twofold: first, in accordance with the law of nature the power within the family lies – or, I prefer to say, lied in Bodin's times – in the hands of the *pater familias* and cannot – or could not – be contested by any of its members. Secondly, since the political community is nothing but an extended family, that same power

which is derived, in the family, from the order established by the law of nature, is legitimately placed – if the focus switches from the smallest natural community to that larger family which is the state – in the hands of the no less natural holder of public authority. Nor are the subjects entitled to require any kind of justification for this state of facts, which is supposed to be given by nature.

For a second strand of Western political thought, however, the reference to natural law is only the first step on the way that leads to an even higher truth, namely to the law of God. Public power, here, comes from God as the only true holder of sovereignty. The way in which sovereignty descends, then, from God to the temporal powers was differently interpreted by the Christian – and then Christian-Catholic – political theology between the Middle Ages and the early Modern Ages. In accordance with the first and most radical understanding, power was transferred by God to the Church and, only in a second step, from this to the secular power (Henricus Hostiensis 1250–1261). A later version still derived the power of mundane sovereigns from God, but directly and not going through papal mediation (Vitoria 1528: 58). The most progressive variant of the Catholic theology of the School of Salamanca went even further, stating that the transition of the legitimate power from God to the worldly rulers had to include the passage through popular sovereignty. Nonetheless, the people were actually excluded, after having transferred the government to the rulers, from the possibility of effectively influencing the decision-making-processes (Suarez 1612: 361). In general, all conceptions which derived public power from divine law can be regarded as belonging to the past, at least in the Western world. However, the idea that sovereign authority is legitimate only if it respects the higher law of God still survives to this day also within the context of Western political culture, in a broad sense, in the guise of the concept of dignity (McCrudden 2013; Cartabia/Simoncini 2015). In fact, if power has to protect human dignity in order to be considered legitimate and, on the other hand, the Catholic Church retains the competence to define what is to be human dignity, then the result can only be that the Church still maintains the claim to possess – however indirectly – the key to sovereign power, as well as that the interpretation of the divine law should continue to be the benchmark of the secular order.

After several centuries characterized by the progressive prevalence of the "revolutionary" concept of the ascendant legitimacy, a third form of "top-down" power was introduced at the beginning of the twentieth century, which is strictly connected with

the development of the bureaucratic-administrative state. It was Max Weber who distinguished, in his *Wirtschaft und Gesellschaft* of 1922, between three ideal types of legitimation of power (Weber 1922: 122). Beside the "traditional" legitimacy, which bears the traits of the "descendant" power of mythological and religious origin, and the "charismatic", which focuses on personal leadership, we have here a third ideal type of legitimacy which is called by Weber "rational". This is characterized by three factors: a) an effective legal system in order to regulate social relations and to give predictability to interactions; b) an efficient bureaucracy with hierarchical structure; and c) the presumption that the holders of power and, in general, the members of the bureaucratic apparatus are endowed with better skills and superior knowledge. Unlike the others, this form of legitimacy belongs explicitly and exclusively to modern society. Nonetheless, it is no less "descending" than the "traditional" or the "charismatic" forms of legitimacy for at least two reasons. Firstly, law does not primarily play the function of defining spaces for the development of the *positive* freedom of individuals, i.e., of their participation in the decision-making-processes. On the contrary, it focuses almost exclusively on specifying and protecting the perimeter of their *negative* freedom. Secondly, the identification with the political community is only expressed through passive obedience to law and authority. As a result, it is intrinsically pre-reflective and founded only on the belief in the superior competences of those who are vested with power (Weber 1922: 20). Most interestingly, the same features also characterize the technocratic justification of the legitimacy of public power in the EU.

2.2. The "Bottom-up" Interpretation of Public Power

In a second and opposite interpretation, the fundament of public power is instead located in the autonomy of the free individuals. By creating a political community and by constituting its powers, the individuals – now united to form a *societas civilis* – transfer their original autonomy, in part or completely, to the public authority so established, vesting it thereby with sovereignty.

The "bottom-up" conception of public power is the result of the transition from a holistic social order to the individualistic paradigm, which was initiated by Thomas Hobbes in the mid-seventeenth century (Dellavalle 2011). Hobbes reversed for the first time in history the traditional hierarchy between the individual and the community, placing

individuals – as holders of rights and as the fundamental source of all legitimate authority – at the centre of political life. The starting point of his political philosophy, therefore, was no longer the social community as a *factum brutum* based on the natural sociability of humans and organically organized in a hierarchical structure, but the individuals with their inherent endowment of rights, interests and reason (Hobbes 1642: Book I, Chap. I). In the original condition of the state of nature – a fictitious condition, constructed by Hobbes not to recall the historical beginning of social life, but to draw attention to the ontological foundation and the conceptual preconditions of a just order – individuals are free and equal (Hobbes 1642: Book I, Chap. III). On the other hand, they are constantly in danger of being attacked and suffering damage to their life, physical integrity or property by their peers, who always endeavour to seize the greatest possible amount of resources in order to improve their living conditions and, ultimately, their chances of survival (Hobbes 1642: Book I, Chap. I; Hobbes 1651: XIII). Therefore, it is the law of nature itself which commands the individual to leave the state of nature by forming a society in which life, physical integrity and property are adequately protected (Hobbes 1642: Book I, Chap. II; Hobbes 1651: XIV). According to Hobbes, the political community is thus not the original source of the ethical world, nor does it possess an axiological primacy in its context. Rather, it is a tool that individuals – the real axiological barycentre of the ethical world – give to themselves in order to improve social stability. In Hobbes's vision, power is ascending to the extent that it is no longer seen as an element that the given political authority deduces from divine law or from its own alleged natural superiority. Rather, it arises from the original freedom and independence of individuals, who create the sovereign authority by an act of free will, i.e., by transferring their rights to the newly established public power in order to ensure an adequate protection of the individual entitlements on the basis of the legitimacy emanating from the same fundament of social order. Sovereign power is, therefore, only legitimate if it aims – directly or indirectly – to safeguard fundamental rights and is based on a free, reflexive and explicit endorsement by the people. Within the strand of political philosophy originated by Hobbes, this approval takes the form of a contract, or *pactum unionis*; in liberal democracies, which are the legitimate heirs of this tradition of political thought, it is expressed through political participation both in elections as well as in practices of civic involvement and commitment outside the electoral schedule.

Differences emerge between the supporters of modern contractualism if we consider the extent of competences attributed to public power. This depends, ultimately, on how many rights are transferred to a sovereign authority by the individuals as the original rights holders in the moment of the creation of the *societas civilis*. Where the transfer of rights is minimized – as in the liberal theory of John Locke – public power has the sole task of ensuring compliance with the law, so that inter-individual transactions can develop peacefully. Individuals thus retain all their original capabilities, except the right to take the law into their own hands. The danger of an excessive concentration of competences in public authority is also prevented by means of a division of powers and by the creation of a powerful parliament (Locke 1690: Book II, Chap. 7, § 90; Book II, Chap. 11, § 134; Book II, Chap. 12, § 143; Book II, Chap. 13, § 150). In the pessimistic perspective of Hobbes, on the contrary, social order can only be safeguarded if individuals give up all their entitlements except the right to life and – very partially – to the safeguarding of an essential space of negative freedom. Within that space, individuals can pursue those activities that help to achieve "happiness", but only insofar as such actions do not jeopardize the overall order of peace (Hobbes 1642: Book II, Chap. XIII; Hobbes 1651: XVII). It follows that Hobbes's contractualism is characterized by the passage from the condition of free individuals to that of subjects deprived of almost all rights: by agreeing to the *pactum unionis*, the freedom of individuals in the *status naturae* goes through a process of voluntary quasi-annihilation, which vests the sovereign authority with virtually unlimited powers. In addition to both liberal contractualism and to that strand of contract theory that eventually comes to absolutist results, a third alternative is represented by Jean-Jacques Rousseau's radical-democratic idea of the "social contract". Here too, sovereign power is established by a transfer of original rights, which is, in some ways, even more uncompromising than in the variant advocated by Hobbes. Indeed, Rousseau's social contract provides for the alienation of all natural rights, without exception (Rousseau 1762: 51). The difference compared to Hobbes is that, while in the view of the English philosopher individuals alienate their rights to a Leviathan, in Rousseau's proposal they transfer them back to their original owners, namely to themselves, now transformed by the social contract into a sovereign political community, which is expressed by the *volonté générale*. Furthermore, although the radical-democratic vision of Rousseau shows an attitude which is – at least potentially – far more sympathetic to the rights of citizens than Hobbes's contractualist

absolutism, it nevertheless encompasses a significant dark side. In fact, as a consequence of both the complete transfer of individual rights and an insufficient establishment of institutions with the task of counterbalancing such transfer, the sovereign authority of the *volonté générale* ends up neglecting the effective protection of the concrete individuality of citizens. It is no coincidence that Rousseau defines the members of the community founded on the "social contract" not only as "*citoyens*" but also as "*sujets*", in particular in their relation to public power, deeming it acceptable that they are even "forced to be free" (Rousseau 1762: 54).

In conclusion, despite the limitations that emerge from all three "bottom-up" conceptions of public power that have been examined – from the self-denial of the citizens in Hobbes, to public power as a mere protection of private law property in Locke, and, finally, to the risks of authoritarianism in Rousseau – modern contractualism has been and still is the historical and conceptual reference point for all those who believe that power is justified only to the extent that it is at the service of interests and rational decisions of the citizens. More concretely, the proposals can be considered obsolete – as in the case of Hobbes – or warranting substantial corrections and even mutual integration – as for Locke and Rousseau. Nevertheless, the idea that the consent of the governed is the only source of the legitimacy of the rulers is still – and should be – the lodestar for anyone who does not want to become acquiescent by admitting that democracy is something belonging to the past.

3. The Legitimacy of EU Public Power

Having defined the main features of the two opposing conceptions of the origin of public power, it is now possible to apply this conceptual framework to the EU. This analysis is justified primarily by the considerable influence that EU public power has on national societies because of their deep integration into the EU institutional framework. Furthermore, the EU has developed its own specific public power, which may have been originally created by the transfer of competences from the member states, but has been – from the very beginning – largely independent of the exercise of sovereignty by member states (Dellavalle 2004/2005). Nor did the developments that followed the explosion of the sovereign debt crisis in late 2009 re-establish the centrality of the traditional decision-

making-processes of nation states: although extensively redesigning the settings of EU power, they merely transferred this from the supranational to the intergovernmental and technocratic-executive dimension.

The debate about the legitimacy of EU public power stands out, among other reasons, as the ideological and cultural terrain in which the old argument of the justification of the power "from above", i.e., on the basis of allegedly superior skills of those who exercise that power, has found new impetus. Indeed, the "top-down" vision of public power – which had been marginalised, first, by philosophical criticism, then by the liberal and democratic revolutions, and, finally, by popular sovereignty – has been granted in the European context an unexpected revival. The fact that the debate on EU public power has been the context on which the elitist vision regained momentum does not mean, however, that this is the only way to interpret its reality and possible developments. To the contrary, EU public power can also be legitimated "from below", to maintain the highest democratic standards within the EU institutions as well.

3.1. Democratic Legitimation

The view that EU public power needs autonomous democratic legitimation is essentially based on a simple syllogism, the premises of which are, respectively, a) that every public authority is legitimate only if it derives from the free and reflexive will of those who are subject to that power, and b) that the EU is characterized by its own public power. The conclusion, therefore, cannot but be that c) EU public power will be legitimate only if it ascends from its citizens. However, it is not enough to say that the legitimation of EU public power by the European citizens is *necessary*; it is also indispensable to demonstrate that it is *possible*. One could assert – along with the supporters of the so-called "no demos thesis" – that, although there is undoubtedly an EU public power, this cannot be subject to the traditional "bottom-up" democratic legitimation because of the lack of a European "demos" (Grimm 1995). The concept of "demos" refers to a social and political community which is assumed to be united by pre-political and pre-legal bonds. Due to the presence of a sufficient social and cultural uniformity, as well as of a strong communicative sphere, the "demos" can take the role of a political actor and guarantee ascending legitimacy. As a result, without a "demos", or without a people characterized by a sufficient

degree of homogeneity, according to this powerful narration no popular legitimation can be achieved.

If we admit the inescapability of the "no demos thesis", then two scenarios are possible: either supranational public power is to be drastically downsized by reallocating a large part of its competences to the nation states which are supposed to be appropriately legitimated through internal democratic procedures, or we should opt for a post-democratic legitimacy. But is the "no demos thesis" really inescapable? Not necessarily – at least if we follow the arguments of Jürgen Habermas, one of the most committed and influential advocates of the democratization of EU institutions (Habermas 1996: 185; Habermas 1998: 151; Habermas 2008: 106; Habermas 2011: 43; Habermas 2015: 552). According to his interpretation, which is based on a long tradition of studies on nationalism and on the history of nation states, the "people" in the Western tradition of the last two centuries is far from being an entity based solely or even primarily on pre-reflexive elements. Rather, it is the product of a complex operation by which national elites, especially during the nineteenth century, have forged a shared identity through the use of instruments and institutions both public and private, like the military, the school, the judiciary, the public administration, the press, and culture at large (Breuilly 1982; Gellner 1983; Hobsbawm 1990; Anderson 1991). Taking up the idea of the essentially *political* origin of the "people" does not imply, however, that the existence of some features which may distinguish a social community even before the start of the political process has to be utterly denied, or even less that the presence of a feeling of shared belonging once this process has been brought to completion should be ignored. What is stressed, here, is rather that the sense of collective identity is not the result of some "ethnic origin of nations" (Smith 1986), but a highly mediated cultural construct which is based on political decisions (Dellavalle 2002).

If the absence of a historically cemented "European people" should not be seen as an insurmountable obstacle to the consolidation of a democratic legitimacy at the supranational level, then the question arises as to the institutional arrangements that could give voice in the best way to the community of European citizens who are assumed to be united by a common aspiration to meet common challenges with shared solutions. Furthermore, the institutional arrangements should also help to consolidate the still fragile European identity by forging a common democratic ethos. On the other hand, EU

constitutionalism has also been interpreted as a rationalization of European national democracies insofar as it opens them up to a stronger awareness of the impact that national decisions may have on the interests of neighbouring countries (Maduro 2010). This surely makes sense, but only if the rationalizing institutional construct is itself democratic. Otherwise, it risks missing precisely those supranational legitimacy resources which are necessary to tame the arrogance of national selfishness. Going now more into detail as regards the institutional reforms which would allow the EU institutional system to align itself with the tradition of democratic "bottom-up" legitimacy, and resorting once again to Habermas's suggestions, a central role has to be assigned to the European Parliament (EP). In particular, this should be elected according to a single procedure and have legislative initiative. In addition, the "ordinary legislative procedure", in which the EP is on equal footing with the Council, should be extended to all areas of competence. As regards the European Council, this would merge with the Council, forming a "House of Nationalities", comparable to the US Senate, but vested with more competences. As for the European Commission (EC), this would assume the task of a government accountable to both the EP and the Council (Habermas 2015: 554). Finally, the European Court of Justice (CJEU) would expand its field of intervention, taking on a similar role as the US Supreme Court.

As a consequence of the crisis, Habermas has recently introduced two significant integrations into his proposal. The first consists in a stronger emphasis on solidarity among the peoples involved in the project of European integration. To better delineate his idea, Habermas resorts to the distinction between moral and ethical uses of practical reason (Habermas 1991: 100). In short, the moral use of practical reason is implemented when we have to define what we owe to every other human being due to the mere fact that we share the same human condition, so that the duties, here, are strictly universalistic and independent of any guarantee of reciprocity. On the other hand, the ethical use of reason is realized within particular contexts, thus establishing our mutual obligation to solidarity. Therefore, moral duties involve everyone, but are substantially "thinner", i.e., they are limited to guaranteeing fundamental rights, while including redistributive measures only insofar as essential requirements are safeguarded. In contrast, obligations to solidarity benefit only those who make up the particular social unit and are expected to extend expensive redistributive performances on the basis of reciprocity and of a shared political identity (Habermas 2013: 102). Traditionally, solidarity is nourished by a belonging to pre-

political social communities, the most significant example of which is the family. In the nation state, pre-political solidarity has expanded to be a mutual responsibility of civic character, though still shrouded within the almost naturalistic guise of the national community. If it is true, however, that the nation is largely a political construct, then nothing in principle prevents civic solidarity from developing in the context of European integration as well. To this end, full recognition must be given to European citizenship, so that European citizens achieve full awareness of the centrality of the European project for the constitution of their political identity (Habermas 2011: 75; Habermas 2015: 553).

The second innovation introduced by Habermas in recent years is conceptually more complex and displays a considerable impact in its overall political and philosophical conception. The starting points are, on the one hand, the revival of nationalistic feelings in many European countries, and, on the other, a legal paradox. As for the social and political dimension, it is striking that the muscular neo-nationalism of the member states comes along with a general increase in the trust that European peoples are keen to lay in their executives – but much less in their parliaments – as the best guarantors of the values of freedom and justice that are enshrined in national constitutions. The legal paradox lies in the fact that on the basis of the jurisprudence of the CJEU (Weiler 1999: 19), and now also of a statement added by the contracting parties to the Lisbon Treaty, EU law has been granted "primacy" over the law of member states in matters of EU competence – even, though with some limitations, over their constitutional law – but not an overall hierarchical supremacy. Therefore, while in the federal tradition a general priority of the law of the federation over that of the federated subunits is recognized, in the EU we are faced with a complex and stratified system in which the primacy of EU law in matters of supranational competence is matched by the ongoing centrality of national legal sources and practices as regards the safeguard of essential standards of freedom and justice. This paradox – at least from the point of view of the traditional unitary and hierarchical legal system – has been generally accepted by way of compromise, but was never resolved through a solid conceptual basis.

Habermas addresses the question through an original conceptual construction (Habermas 2011, 59; Habermas 2013: 80; Habermas 2015: 553), which bears some resemblance to the theory of demoi-cracy, although maintaining a stronger federalist component (Nicolaidis 2003; Cheneval/Schimmelfennig 2013; Bellamy 2013). In particular,

he claims that in a traditional federal system the legitimation of central public authorities is guaranteed by the citizens of the federation *exclusively in this function*. In other words, insofar as they are called to give legitimacy to the central public power, the citizens of the federation suspend their status as citizens of the member states and come into action only in their political identity related to the central unit. In doing so, they are indeed the source of two forms of legitimacy – that of the federation and that of the federated state of which they are also citizens – but the two procedures of legitimation are strictly independent. In contrast, EU citizens do not suspend their status as citizens of the member states in legitimizing EU public power, so that legitimacy is here inherently twofold, coming at the same time from EU citizens and from the citizens of the member states. This dual legitimacy is expressed in the EU institutional structure through the ordinary legislative procedure, according to which a bill must be approved by both the EP and the Council, and therefore, even if indirectly, by the citizens of the member states. The specific EU system of shared sovereignty achieves two results: on the one hand, it ensures democratic legitimacy to EU institutions; on the other, since in the EU institutional context the member states are not constitutional organs – such as in the traditional federations – but remain constituent powers, national states would retain their original role of guarantors of the standards of freedom and justice which have been consolidated by domestic constitutions. The conceptual construction of dual legitimacy would also have the merit of solving the paradox of the sector-specific primacy of the EU without developing a general hierarchical supremacy. In fact, if nation states continue to be fully and independently legitimized in a democratic sense, then the law produced by them – in particular at the constitutional level – has full autonomy and equal legal status with respect to the more inclusive EU law. As a result, in a multilayered and stratified legal system conflicts between norms cannot be resolved by resorting to a hierarchy of sources that is missing and should not be established, but only through dialogue between institutions and, in particular, between courts.

The denunciation of the "democratic deficit" of the EU, as well as proposals to overcome it, have been part of the debate – with only marginal adjustments – for at least thirty years. In this sense, the assertion that "none other than Germany's leading philosopher and public intellectual keeps designing the contours of a non-federal European democracy which would build upon the co-originality of European and national identities"

(Chalmers/Jachtenfuchs/Joerges 2016b: 17) should be understood, if not as a joke, then as a kind of low blow in a hard-fought ideological and political battle. In fact, although often sidelined by the predominant technocratic mainstream, proposals for a "bottom-up" democratization of the EU are present in a debate which goes even more into detail than Habermas's suggestions (Franzius/Preuss 2012; The Spinelli Group 2013). Nor do they deserve to be ridiculed. Nevertheless, a substantial problem persists which should not be simply passed over in silence. Indeed, if the analysis is correct and solutions for a "bottom-up" democratization are feasible, why have these never been successfully implemented? Yet, the answer could be easier than many seem to assume – and not so negative for the outlook of EU democracy. Concretely, it might not be a question of *substantial and objective impossibility*, but of a *lacking of will*, whereby the latter is by far more prone to changing than the former. The reason for democratic stagnation should be sought, thus, in the fact that, for an institutional reorganization to be realized, a political will is needed which has been missing in the last decades of European integration. In reality, the centrifugal forces of parochial interests were not only always present, and powerful in slowing down the process of integration, but eventually gained the upper hand by sidelining efforts towards democratization, and by imposing an old-fashioned and ultimately inefficient intergovernmental method. The current crisis of the democratization impetus does not prove, however, that the idea was wrong. Rather, the poor results that have been achieved by applying the opposite approach should be a strong motivation to take up the supranational democratic perspective again. In fact, contrary to what Hegel thought, what is real is not always the perfect implementation of the rational.

3.2. Technocratic Legitimacy

The starting point of the second way to legitimate EU public power is the exact opposite to the approach analyzed in the previous section, namely that full democratic legitimacy would not be possible at the supranational level due to the absence of a European demos. Therefore, no alternative is given to the post-democratic legitimacy of EU public power, which – curiously enough – turns out to be quite similar to some pre-democratic forms of legitimacy. The core assumptions of this approach were perfectly synthesized by Fritz Wilhelm Scharpf in a seminal work which was published – almost as a kind of counter-proposal – during the most creative period of EU constitutionalism

(Scharpf 1999). Scharpf placed at the basis of his analysis the distinction between two forms of legitimacy: "input-oriented legitimacy", and "output-oriented legitimacy". The first refers to the participation of the citizens in the creation of the norms that govern their lives, corresponding therefore to what Abraham Lincoln defined as "government by the people". In contrast, the second form of legitimacy addresses a largely passive acceptance of authority, due mainly to the belief that this acts in the common interest, thus accomplishing what has been called – again by Lincoln – "government for the people". While the first understanding insists on the active involvement of the governed, the second focuses on their tacit consent, at least as long as the measures taken by the authorities are perceived as beneficial to the self-realization of individuals in the sphere of their negative freedom as well as to the improvement of their living conditions. In nation states, the two dimensions of legitimacy generally coexist, so that civic participation almost naturally leads to the implementation of shared interests, and the involvement by the citizens comes along, almost seamlessly, with a high degree of trust in institutional arrangements. However, this unity of purpose is – according to Scharpf – far from obvious; on the contrary, it is rooted in a pre-existing substrate of common historical, linguistic, cultural and ethnic elements. In other words, without a pre-political and pre-legal dimension, no guarantee is given that a legitimacy of public power that ascends from the will of the governed will lead to the benefit of all, and not just of a majority. Since Europe lacks a common pre-political and pre-legal substrate, the result cannot but be that the two dimensions of legitimacy no longer spontaneously overlap.

The conclusion drawn by Scharpf was that EU public power should be understood quite restrictively, and still depends essentially on the agreement of national governments. Moreover, since in a context devoid of a strong collective identity it cannot be guaranteed that decisions taken by a majority are perceived by all as aiming at the implementation of common interests, EU legitimacy cannot but be essentially "output-oriented". Faced with the silent consent of the citizens, the legitimacy of EU public power is to be built – in consonance with Weber's concept of "rational" legitimacy – on the assumption of a higher expertise implicitly attributed to the holders of public power. Therefore, if EU public power does not to find its *raison d'être* in the active consent of EU citizens, and in their democratic participation, but in the widespread confidence in the competence of the EU

institutions, then we will be faced with a kind of revival, although under a new and specific guise, of what has been defined before as the "descendant" understanding of public power.

Scharpf's theory of output-oriented legitimacy as the only way to justify EU public power was flanked, and followed, by numerous similar attempts. Even Joseph H. H. Weiler – for decades probably the most refined expert of EU law at the international level – did not refrain from the effort to give reasons for the unjustifiable EU democratic deficit. Indeed, he introduced in his analysis of the specific features of supranational power the distinction between a "formal" and a "social" legitimacy, where the latter "connotes a broad, empirically determined, social acceptance of the system" (Weiler 1999: 80). Insofar as he admitted that one of the main problems of EU power lies precisely in its lack of legitimation, the solutions proposed, aiming primarily at ensuring greater transparency, were far from satisfying the fundamental epistemic principle of democracy, namely that *volenti non fit iniuria*, and from guaranteeing full democratic participation (Weiler 1999: 348). In fact, Weiler openly admitted that the quality of European integration should not be sought in the extension of democratic practices to the post-national constellation, but rather in the respect of the "other" and in "constitutional tolerance" (Weiler 2001: 62).

A further variant of the technocratic justification of EU public power underlines – in a way which may be surprising, at least at first glance – its deliberative dimension, in particular with reference to the phenomenon which has been described as "comitology". This concept refers to the practice, specified by law, whereby the powers of the EC are exercised, in the application of EU law, by having recourse to committees composed of representatives of the member states. The procedure can be interpreted – with good reasons – as having the primary purpose of maintaining control by member states in areas deemed sensitive to national interests, thus limiting the autonomy of the EC as a supranational body. Nor is it to be assumed that the reform of comitology introduced by the Lisbon Treaty, albeit slightly strengthening the EP, really did change the intergovernmental setting (Savino 2011). Comitology, however, was also read in almost the opposite perspective, i.e., not as an instrument of governance implemented by the executives in order to circumvent parliamentary control, be it national or supranational, but as an expression of deliberative participation in Europe. Concretely, the comitology system would have the merit of creating a space where domestic interests, represented by national governments, can be mutually recognized, and thence finally reach a respectful agreement

between different positions (Joerges/Neyer 1997). In fact, it may be understandable that, once the dominance of the executive powers is accepted, the creation of spaces for dialogue between governments should be welcomed. A significant problem arises, however, when the advocates of comitology improperly apply to the phenomenon a conceptual framework which is explicitly derived from the theory of democracy. By interpreting intergovernmental confrontation as a deliberative sphere, they normatively ennoble the transfer of competences from the legislative to the executive. In other words, deliberation among citizens that characterizes democratic practice is replaced by deliberation among member states. As a result, the theory of comitology becomes an ideological tool to mask the technocratic expropriation of citizenry.

The same cloaking of technocratic rule by its merger with an alleged deliberative dimension characterizes the recent introduction of the new concept of "throughput legitimacy" (Schmidt 2010). If input legitimacy focuses on democratic procedures to guarantee the participation of citizens, and output legitimacy focuses on the performances that a political and legal system has to provide in order to be accepted, throughput legitimacy addresses what might be called "the interest consultation with the people" (Schmidt 2010: 7). In other words, attention is devoted here to what happens within EU governance processes and, in particular, to how these should be open to requests from the civil society. According to Vivien Schmidt's analysis, "throughput legitimacy via interest-based intermediation and consultation with the people … represents a way in which minority interests can gain a voice even without a majority vote" (Schmidt 2010: 20). These interests include not only the demands made by large and powerful economic actors but also "more diffuse difficult-to-organize majority interests such as consumer groups and public interest oriented groups such as environmental groups, policy think-tanks or even social movements" (Schmidt 2010: 20). In conclusion, a decision is legitimate insofar as it takes into account as many and various proposals emerging from the population as possible. Regardless of whatever good intention might have inspired it, the introduction of the new notion of throughput legitimacy is problematic for two main reasons. First, attention to processes that, in addition to participation in elections, allow an ongoing involvement of citizens and organizations of the civil society is in itself an inescapable feature of any serious theory of democracy. Thus, the introduction of a new concept turns out to be superfluous and in clear contradiction with the essential epistemological principle

contained in Ockham's razor. Nevertheless, it would be naive to believe that the problems of the theory of throughput legitimacy can be reduced only to a methodological dimension. In fact – and this is the second reason for criticism – democratic discourse and genuine participation are substituted, here, by a highly selective opening of institutions to the civil society, in which no guarantee of equal treatment is given. In doing so, however, one of the main features of a true democracy is cancelled, namely the neutralization of the social dimensions of power by political interactions within the democratic arena.

While the theories of comitology and throughput legitimacy ennoble the technocratic drift by masking it behind a curtain of democratic conceptualism, another form of the revival of the "descendant" justification of public power explicitly endorses the supremacy of the bureaucratic-administrative regime. By doing so, it turns back to the clear-cut alternative, proposed by Scharpf, between a democratic and a functional legitimacy. A first variant of this uncompromising apology of technocratic legitimacy is based on the application of the concept of "executive federalism" to the EU (Dann 2006: 237). This notion, which is derived from the *Exekutivföderalismus* of the German constitutional tradition, refers to a particular form of federalism where federated subunits take on the implementation of the decisions issued by federal institutions. As a result, federal administration is reduced to a minimum, and federated subunits, in return for their efforts to give direct effect to federal legislation, are granted a central role in the determination of common policies. The analogous supranational organ to the German *Bundesrat* would be the Council, although, because of deeper cultural and political differences, the competences of the latter are broader, the defense of parochial interests fiercer, and the resulting difficulty in reaching compromises greater. The application of the concept to the EU, however, may be misleading. In fact, while national "executive federalism" is moderated by robust parliamentary control mechanisms, in the EU no similar institutional arrangements exist, so that "political responsibility … becomes diffused, until it vanishes in its entirety" (Oeter 2006: 79).

If the theory of "executive federalism" still shows some restraints in its defence of the technocratic legitimacy of EU public power, according to a second variant no room is left for doubt: the legitimacy of EU public power, here, is openly and unequivocally defined as a purely "administrative legitimacy". After reiterating the "no demos thesis", Peter Lindseth applies the conceptual construction of the relation between "principal" and

"agent" to the EU, arguing, as a result, that EU institutions cannot but have a "functional" legitimacy since they are administrative "agents" of decisions taken by the nation states as "principals". In that sense, they are operating in a space located beyond the sphere in which democratic legitimacy takes place (Lindseth 2014: 534). Lindseth does not deny the autonomy of the decision-making-processes of EU institutions, but rather intends to identify and justify a decisional context which should be regarded as free from any obligation to legitimation by the citizens, in particular in their quality as EU citizens. If the source of identifiable and significant legitimacy is the nation state, but this is so far away that the legitimation chain becomes almost imperceptible, then the technocratic Golem has finally received its breath of life and its justification to move into the realm of a post-democratic autonomy.

4. Which Scenarios for the Future?

At this point we must ask ourselves which scenarios for the future are reasonable and desirable on the basis of the conceptual framework presented in the previous sections. In this regard, we can see how the recent crisis has been dealt with according to procedures that have clearly favoured the "descendant" conception of public power. In fact, one of the most important measures – namely the Fiscal Compact of 2012, which came into force in 2013, compelling nation states as signing parties to insert into "provisions of binding force and permanent character, preferably constitutional" the rule that national budgets "shall be balanced or in surplus" – is an international treaty which, although signed by 25 EU member states, is outside the EU legal framework *stricto sensu*. The most obvious consequence is that the EP was set aside, for the benefit of the executive powers. Furthermore, the idea of a full democratic legitimacy through national parliaments also turned out to be illusory: in fact, if it is true that international treaties require parliamentary ratification, it is also undeniable that the parliamentary vote in this case did not allow amendments and was reduced to a "yes or no", in which the pressures by the executive may prove to be decisive, nor was it possible for national parliaments to control the subsequent measures issued by executive institutions.

In contrast, both the Six-Pack of 2011 and the Two-Pack of 2013 – consisting, respectively, of five regulations and one directive, and of two regulations – are located

inside the legal framework of the EU. The seven regulations and one directive were all adopted jointly by the EP and the Council and aimed at strengthening control over budget deficit. However, since this control is exercised, once again, exclusively by the executive, the approval by the EP equated to a substantial self-disempowerment by the EU legislature, which is not balanced by any comparable possibility of intervention by national parliaments. The European Stability Mechanism (ESM), which replaced in 2012 the previous European Financial Stability Facility (EFSF) and the European Financial Stabilization Mechanism (EFSM), is similarly characterized by its technocratic quality: although generated through an amendment to art. 136 TFEU, which was also approved by the EP, it centers all powers in the hands of the executive as well, either to the EC, or to intergovernmental committees.

Therefore, no occasion would have been better to prove that "descending" public power is characterized by higher rationality and competence than the governance of the European financial crisis, which was fully in the hands of the executive and virtually autonomous from democratic control. On the contrary, instead of a perfect scenario, we are faced with an unstable and largely unsatisfactory situation for at least three main reasons. Firstly, the crisis of the Greek sovereign debt, despite having been stabilized, appears far from settled, as even acknowledged by the International Monetary Fund as one of its protagonists. Secondly, one of the justifications for European integration has always been the defence of the European welfare model. Contrary to what one might expect, however, the index that measures inequality – or Gini coefficient – has increased substantially in the last two decades, although in different degrees, in all EU countries, which provides sufficient evidence that the European technocracy was either unable or unwilling to defend the social benefits of continental welfare. Moreover, while the rise in inequality can be seen as a long-term phenomenon affecting more or less all Western countries and, therefore, not directly attributable to the "top-down" management of the debt crisis, another negative social trend, instead, has been worsening dramatically since 2009. Indeed, the share of the population in poverty has also increased significantly, but not uniformly in all countries, demonstrating that the promise to bring about convergence in the living conditions of the populations of the member countries has also not been fulfilled. Thirdly, output legitimacy of public power should be based on the trust in the superior skills of those who are called to exercise it, both at the national and EU level. Yet,

if Eurostat findings are used as a basis for judgement, such confidence – albeit relatively stable – rarely exceeds 50 %, with an average of around 40 %, as regards the EU, while domestic institutions get even worse average results.

In essence, then, the claim that technocratic governance of public affairs would achieve the best results due to the alleged higher rationality of power holders seems not to be substantiated by any evidence. Rather, it must be assumed that some of the problems that have emerged in recent years would have been better addressed using the fundamentals of a well-developed legitimacy "from below", and of a stronger feeling of solidarity between citizens. Starting from the acknowledgement of this matter of fact, two opposite strategies – in line with the dichotomy that has informed the whole debate – are conceivable: the more or less far-reaching renationalization of European policies, or a decisive step forwards towards a convincing democratization of the EU institutions. Beginning with the renationalization strategy, what is striking, first, is the heterogeneity of the coalition that is vigorously pleading for it. At least three different groups – and interests – are gathered under a variegated banner. The first group – the location of which is less surprising – comprises those who, like Dieter Grimm, always warned against the risks of European integration going too far. In particular, the need is underlined to preserve the national political community as the only area in which democratic legitimacy can be fully implemented. In his more recent works, however, Grimm takes for granted what he had previously criticized, namely the "constitutionalization" of the EU. Yet, even if the EU is assumed to be a constitutional space *sui generis*, it is its presumed "overconstitutionalization" that Grimm now rejects (Grimm 2015). His proposal for a simplification of EU primary law, which should cover only the most properly constitutional contents, while many specific provisions now contained in the treaties should move into secondary law, surely deserves to be taken seriously. Nevertheless, what disturbs Grimm most seems to be that the "overconstitutionalization" of the EU would have led to an excessive amount of competences held by the EC and by the CJEU, with a further worsening of the democratic deficit. The need to counterbalance this shortcoming could not be entrusted, according to his perspective, to the EP because of the limits usually attributed to supranational democracy, namely the lack of an electoral system shared by all member states for the election of the EP, the disparity of representation in relation to population, the weakness of European parties, and the absence of a genuinely

supranational public opinion. Given that the diversity of representation in relation to the population is a feature not only of the EP, but of all federal systems due to the necessity to protect minorities, Grimm's analysis – as it is always the case for explicitly or implicitly eurosceptical authors – does not develop any feasible solution for the strengthening of supranational democracy. Rather, he moves on directly to solutions which are thought to deconstruct the supranational dimension. More concretely, he locates the bulwark against technocracy and depoliticization in the European sphere in national constitutional courts (Grimm 2014). Yet, it is at least optimistic, if not contradictory, that the judiciary, which is presented as an example of technocratic drift in the EU, might be called upon to play the precisely opposite role in the national context.

The presence of the second group of authors, in the midst of the renationalization movement, is altogether more surprising. This group consists of mainly progressive and leftist thinkers who have seen their hopes for a democratic and social Europe largely disappointed by what the Union has become. Surely, there are good reasons to be dissatisfied with the acquiescence of the EU towards the principles of ordoliberalism in general (Streeck 2014), and of capital owners in particular (Menéndez 2016a), or with its incapability to address the migrant crisis with a due sense of justice (Menéndez 2016b). Nonetheless, the quite convincing criticism against some EU policies turns out to be illusionary or even misleading when it ends up praising the unbroken virtues of nation states. As Wolfgang Streeck argues, the more we want to save what remains of the welfare state, the more competences the EU should give back to the member states (Streeck 2014; Streeck 2015). Therefore, the only kind of "more Europe" that we need would be the return to the continental constitutional tradition of the nation states, in which capitalism was tamed by the social dialectics of national politics (Somek 2013). Yet, it is curious that nation states, within this narrative, are not blamed for any social or political distortion, although the recently reintroduced intergovernmental method may have contributed to the shortcomings at least as strongly as – and probably more than – the supranational institutions. Moreover, it sounds like a profession of faith if the social and political conditions of nation states are regarded as essentially sound and intact, even though the current pathologies have originated largely in their context.

The most astonishing presence among the supporters of renationalization, however, concerns the third group, which includes scholars who have been for a long time among

the most committed apologists of EU governance. Though divided among themselves because of distinct conceptual premises – some come from the deliberative theory of demoi-cracy (Nicolaidis/Watson 2016), others from a rather functional understanding of social rationality (Scharpf 2016; Majone 2016) – they all share a plea for the partial disentanglement of the EU. This should happen, however, not primarily on the basis of considerations regarding democracy and justice – as in the former group – but for the purpose of maintaining some decisive functional performances, now to be re-located into an intergovernmental setting. According to these authors, the problem arose when European integration, and in particular monetary union, led to redistributive actions which were not covered by adequate legitimacy (Chalmers/Jachtenfuchs/Joerges 2016b: 3). To solve the problem, more intergovernmental cooperation should be envisaged through variable geometries of different associations of member states, or "club goods" (Chalmers/Jachtenfuchs/Joerges 2016b: 23; Majone 2016), whereas social and economic difficulties should be internalized and European governance should concentrate on the prevention of spillover-effects (Nicolaidis/Watson 2016: 75). In other words, poverty should be kept at home and dealt with by resorting to national means, while the intergovernmental level should protect the most influent shareholders – not exactly an attractive perspective for the future of European integration. Furthermore, it is interesting that the "Eurocrats" have become, here, the preferred target for criticism, whereas European technocracy had been generally defended for long time by the same authors. The reason might be that the "Eurocrats" seem to be now the most committed defenders of an essential level of continental solidarity against the selfish interests of the most powerful member states. Thus, since a further empowerment of the EP was never seen as a serious option by these scholars, the question is only about which institutional structure can best guarantee that the most powerful interests can have the most favourable stance. Until a couple of years ago, this appeared to be best ensured by the EU technocracy, as opposed to intergovernmental cooperation as advocated now. Under these premises, the belated revaluation of input legitimacy by Scharpf – yet only at the national level – takes the shape of a rather captious argument (Scharpf 2015; Scharpf 2016).

The recent *White Paper of the Future of Europe* of the EC presents alternatives on the basis of two variables: the depth of European integration, and its inclusiveness (European Commission 2017). Following the first variable, we can aspire to *more integration* or accept a

weakening of EU governance, while according to the second we can aim at doing *all together what can be generally agreed on*, or take the way of a *two-speed Europe*, with an essentially federal core Union plus some more or less closely associated countries. Leaving aside the perspective of a weaker EU governance in the future, which would be nothing other than the acknowledgement of a failure with unpredictable results, all other solutions envisage some kind of progress in the integration process, albeit under the condition of a limited inclusion according to one variant. However, regardless of which option for improvement we may prefer, the *White Paper* does not mention democratic legitimacy and social solidarity as the crucial factors in the decisions on the future of EU integration. Against the background of the existential crisis of the EU project, it is time to show more courage, claiming explicitly that any resolution on how to go ahead should be taken on the basis of two fundamental criteria. The first is how the Union can be shaped in a more legitimate – in the sense of "bottom-up" legitimacy – and democratic way. The second criterion is how we can make it more socially just. As regards the first issue, if the EU "top-down" public power is in crisis, and the renationalization is either illusory or cynical, we cannot but resume the other option, namely the radical democratization of EU institutions. In this sense, it is not – or at least not only – about the democratization of the institutions of supranational governance, such as the EC, the European Central Bank (ECB) and the CJEU, as recently argued by Antoine Vauchez (Vauchez 2016). This step is indeed important, but it does not properly implement the fundamental tenets of democracy, which should be based on inclusion, participation and reflexive decisions by all involved. Transparency, though an essential condition, cannot do the job alone, replacing what is the inherent task of representative and participative democracy. Rather, as proposed in the Rome Manifesto of 2017, democratization should address the very institutional architecture of the EU by creating a strong legislative power made up of the EP – as the "house of the people" – and of a newly constituted Senate – as the "house of the states" – in which the European Council and the Council should merge. Furthermore, majority voting and qualified majority should be the rule, respectively, in the EP and in the Senate. Lastly, the President of the EU, as the head of the executive – or, more precisely, of a reformed Commission – should be directly elected through a democratic process. Yet, democratization alone cannot be enough if it does not come along with more solidarity and justice. EU citizens must feel again that the European project is about the improvement of their living conditions and that no one – no

individual or social group in the single states, and no single country among the member states of the EU – will be left behind. It is only under these conditions that the idea of a United Europe can hope to win the battle for the hearts and minds of the European citizens.

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